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No. 89-1923

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

RODNEY D. HENDRICK,
Petitioner,

versus

H.E. AVENT, ET AL., AN UNINCORPORATED ASSOCIATION, H.E. AVENT, MARK S. AVENT, BRANTLEY T. BURNETT, W.J. KINNEY, JAMES A FINK, JR., DEBORAH W. FINK, AND JOHN C. LINDSAY,
Respondents

On Petition for A Writ of Certiorari To The United States Court Of Appeals for the Fifth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED

1) Whether the doctrine of res judicata bars a later lawsuit which collaterally attacks a judgment arising from a contested proceeding in bankruptcy when the relief sought in the subsequent lawsuit by the debtor and trustee is necessarily in conflict with the crux of the bankruptcy court order?

2) Whether petitioner may properly attack the final judgment of the bankruptcy court by a complaint in Civil RICO and federal securities laws rather than by a motion or complaint pursuant to Rule 60(b)?

3) Whether plaintiff's claims pursuant to the federal securities laws and the Civil RICO Act are precluded because they arise from a sale of stock approved by court order after a contradictory hearing?

4) Whether plaintiff is entitled to relief pursuant to Rule 60(a) when such relief would result in impermissible substantive changes inconsistent with the bankruptcy court's intent?

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D. STATEMENT OF THE CASE

This matter comes before the Court on a petition seeking a writ of certiorari to review a judgment of the Fifth Circuit Court of Appeals which affirmed a summary judgment granted in favor of the defendants by the United States District Court for the Middle District of Louisiana.

No reasons exist in this case so as to call on this Court's exercise of its discretion to grant a writ of certiorari.

The plaintiff has seen fit to brief at length various "facts" about which he contends there is a genuine dispute which would render the grant of summary judgment improper. However, the defendants' motion for summary judgment calls upon the Court to consider only genuine disputes of "material fact". FRCP 56. The facts which are material to defendants' motion are not disputed, and in fact are all matters of public record. They are as follows:

1. The sale of stock that is the subject of this suit was made pursuant to an order of a bankruptcy court. A-1.

2. The order of the bankruptcy court was entered upon the application of trustee and former plaintiff, Starns following a contradictory hearing at which both plaintiffs appeared. A-8.

3. The trustee's application stated that the proposed transaction was a sale of 10% of the stock of P.F.C., Inc., in an "allegedly non-collusive arm's length transaction" for $150,000 cash. A-10.

4. The application also stated that the trustee's expert on valuation had "investigated to some extent the value of PFC, Inc., and [had] concluded that the offer being made to the estate and the trustee equal[ed] or exceed[ed] the book value of PFC, Inc." It also stated that the trustee believed that two other owners, Mr. Herbert L. Polk and Mr. Francis A. Collins, holding a combined interest of 60% of the PFC stock, had very recently sold their interests in the company for $850,000 each. A-10.

5. The debtor, Hendrick, objected, through counsel, to the proposed sale of the stock on grounds of inadequacy of the price, pointing out in his objection that the 10% interest was worth between $250,000 and $266,667 based upon the recent transactions in the stock. A-15.

6. At the hearing on the application Starns testified that he was "less than satisfied" with the offer and that he had not been given honest information about it by Mr. Polk. Transcript of Hearing on Application to Sell Stock, February 13, 1985. Ex. 6, at pp. 40-41.[1]

7. At the same hearing, counsel for plaintiff stated that he did not believe that he was getting the full story about the offer, that plaintiff was getting $100,000 to $110,000 less on a pro rata basis than were Polk and Collins. Transcript Ex. 6, at p. 43.

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[1] "Ex." references in this opposition refer to record excerpts prepared for and on file with the Fifth Circuit Court of Appeals.

8. Although counsel for plaintiff complained to the bankruptcy court that he lacked information, there was extant, at that time, a South Carolina state court order which granted plaintiff complete access to all of PFC's financial information. A-3.

9. At the hearing plaintiff's counsel called James A. Fink as a witness. Mr. Fink was not subpoenaed by the trustee or the debtor and had appeared in the courtroom completely fortuitously and then only to deliver a check to consummate the sale. Mr. Fink was not represented by counsel at the hearing and was not aware that he would be called as a witness. Transcript, Ex. 6, at pp. 10-12.

10. Counsel for Starns acknowledged that he had the most recent financial statements of PFC, Inc. but had not brought them to court. Transcript, Ex. 6, p.25.

11. The court and counsel for Starns elicited the testimony of Mr. Fink concerning valuation-related matters. Transcript, Ex. 6, at pp. 23-27 and 36-37.

12. Immediately after the hearing, the bankruptcy judge signed an order prepared by counsel for the trustee authorizing the trustee to sell the P.F.C. stock free and clear of all liens, claims and encumbrances. A-2.

13. Neither the trustee nor the debtor ever appealed the order of the bankruptcy court or moved to have it reconsidered in any way. Instead, the transaction was completed in the courtroom immediately after the court rendered its order.

14. On February 12, 1986, the trustee and the debtor filed a suit for damages based upon the securities laws of the United States, RICO and various state laws. It was not until November 6, 1987, that plaintiff filed a second amended complaint seeking rescission of the sale.

Although plaintiff alleges a great number of "facts" that are in dispute, none of these are material to the issues of claim preclusion which are advanced by the defendants. These disputes of fact are addressed ad nauseam in briefs which were submitted to the district court in support of the defendants' motion for summary judgment. The briefs were also placed in the record before the Court of Appeals. (See Ex. 2) It is submitted that the allegations made by the plaintiffs to the lower courts and to this Court are adequately refuted in that memorandum. The plaintiff seeks to avoid the claims preclusion arguments advanced by the defendants by inviting this Honorable Court to consider factual disputes other than those which are material to the argument which prevailed before the District Court and the Court of Appeals. In fact, in order to make these assertions more alluring, plaintiff argues that the Fifth Circuit acknowledged that "the defendants' actions were 'shocking'". Plaintiff's Brief at page 2. As a matter of fact, a review of the Fifth Circuit opinion reveals that the Fifth Circuit specifically declined to pass on those issues of fact or even to consider them. The Fifth Circuit emphasizes its refusal to pass on non-material facts by prefacing its comments regarding the plaintiff's assertions with remarks which clearly show that these assertions are treated only as unproven allegations, which they are. In the Fifth Circuit's opinion at 891 F.2d 583, 585 the court comments that:

> While the facts alleged by Hendrick are tantalizing, this appeal focuses only on the avail-

> able methods of attacking the bankruptcy court's approval of the stock sale.

Further, on the same page of the Fifth Circuit opinion, the court comments that:

> Consequently, the eloquent and intriguing story revealed in appellant's brief, which is quite shocking, is not before us, except that it can be noted that at the time of the bankruptcy court ruling, neither Hendrick nor the court had full knowledge of all that had taken place in a complex scheme of facts.

In both of these comments by the court, it is clearly indicated that none of the plaintiff's assertions are treated as proven fact. Although the court noted that neither Hendrick nor the Bankruptcy Court had full knowledge of all that had taken place in a complex scheme of facts, this is more an indication of the lack of due diligence by Hendrick and the trustee who had access to all of the financial information of the subject corporation both in their capacity as shareholder of the corporation and by virtue of a standing South Carolina state-court order granting them rights of inspection at the offices of the corporation at monthly intervals.(See A-3) Moreover, plaintiff's objection to the trustee's application for authority to sell the stock indicates that the plaintiff was aware of the most recent transactions in the stock and prices that were paid in those transactions.

The irrefutable facts which are set forth above fully support the opinion which was ultimately rendered by the Fifth Circuit.

E. SUMMARY OF ARGUMENT

Plaintiff's claims are barred by several theories of claim preclusion including res judicata. All theories of claim

preclusion advanced by defendants rest upon the fact that the issues of authorization of the stock sale and adequacy of the consideration therefor have been litigated and disposed of by a final, unappealed judgment of the Bankruptcy Court. This action is merely an impermissible collateral attack on the Bankruptcy Court's judgment. In this action, the court is asked to reverse the two essential holdings of the bankruptcy judgment, namely that the price paid was adequate and that the sale could be made.

Plaintiff's suit is not a motion or complaint for relief pursuant to Rule 60(b) which is the sole avenue to attack a final judgment of bankruptcy court. Even if the complaint could be construed as a request for such relief, the request is not timely and cannot be granted.

The district court properly refused to grant plaintiff's request for relief pursuant to Rule 60(a) because the record reveals that the order prepared by the trustee's counsel and signed by the Bankruptcy Court clearly expressed the court's intention and contains no error. Further, the relief sought by the plaintiff in his motion would destroy the finality of the judgment and would be an impermissible modification of substantial rights of the parties affected by the judgment.

The decision of the Fifth Circuit, in all the above respects is in complete accord with decisions rendered by other circuits and by this Court.

F. ARGUMENT

1. PLAINTIFF'S CLAIMS ARE BARRED IN THEIR ENTIRETY BY THE DOCTRINE OF RES JUDICATA.

Montana vs. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979) follows the often stated rule that in order for res

judicata to apply to a judgment (1) the parties must be identical in both suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) the same cause of action must be involved in both cases; and (4) there must have been a final judgment on the merits.

The decision of the Fifth Circuit Court of Appeals in this case strictly adheres to Montana and other Supreme Court cases addressing this issue.

In this case, the contradictory hearing authorizing the sale was on both the trustee's application for authority to sell and the debtor's formal objection thereto based upon alleged inadequacy of the price. All of the defendants either purchased stock pursuant to the order or they allegedly conspired with those who did to the extent that they are liable as if they had been purchasers. There is no dispute that the Bankruptcy Court had jurisdiction. No appeal was taken by any party, nor has any party sought relief in the Bankruptcy Court pursuant to Rule 60.

a. The Bankruptcy Court's order is a final order.

This Court has ruled affirmatively that judgments and orders issued by bankruptcy courts are final judgments. Parties whose rights are affected by such judgments are bound by the principle of res judicata unless they seek modification in bankruptcy court or appeal the judgment. In Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 250, 83 L.Ed. 104 (1938) a bankruptcy court's release of guarantors was given res judicata effect even in the absence of personal jurisdiction over the creditor because the creditor failed to appeal the judgment regarding jurisdiction.

In so holding, the Court in Stoll commented:

> It is just as important that there should be a place to end as that there should be a place to

> begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first. 305 U.S. at 172.

Although Stoll predates the current bankruptcy code and rules, the case addresses the issue of res judicata as it applies to judgments obtained as a result of a motion and summary adjudication virtually identical to the current procedure for contested matters.

Under Bankruptcy Rule 9001 (7), the term "judgment" is defined to mean any appealable order. Bankruptcy Rule 8002 provides the procedure for appealing an order authorizing a sale of property of the estate. In order to enhance the commercial appeal of these sales, the rule provides for an unusually brief appeal period of only ten days for orders authorizing a sale. Section 363(m) of the Bankruptcy Code provides that:

> The reversal or modification on appeal of an authorization under sub-section (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

These provisions provide finality to any sale made by a trustee pursuant to the court's order. It allows the purchaser

to rely on the order. Without this rule, it is doubtful that such sales would have any commercial appeal whatsoever. If a purchaser is required to concern himself with the possibility of rescission of his sale after having paid a fair price, few would be willing to take such a risk.

From the statutory authority, bankruptcy rules, and jurisprudence, it is apparent that an order authorizing the trustee to sell the debtor's assets is one which must be accorded the effect of res judicata.

b. The parties to this action are identical to the parties before the court in the prior action in the Bankruptcy Court.

Hendrick and Starns, the plaintiffs in the district court, were both parties to the bankruptcy proceeding. Defendants are the purchasers of the stock pursuant to the court order and several other persons alleged to have conspired with or aided and abetted them in a way that would render them liable to the plaintiffs as if they had been purchasers.

Successful bidders in bankruptcy sales, even if formerly strangers to the proceeding, are deemed to become parties by means of their bid. By submitting a bid that is accepted, they become bound by the sale order, and may challenge any action thereafter taken that may affect the rights they acquired by means of the order. Blossom v. Milwaukee & Chicago R.R. Co., 68 U.S. 655, 17 L.Ed. 673, 673-74 (1864). The Fifth Circuit's holding in the instant case is in accord with the Court's more recent decision in Montana, supra. In Montana, the Court held that the government's participation in a suit brought by a contractor made the government a party to the judgment for the purpose of determining whether res judicata should apply. Similarly, in this case, all parties who participated

in the sale are privies of the persons named in the judgment and are conclusively bound by it.

The purchasers of the stock here must be considered "participants" in the proceeding with respect to the order of sale, for the hearing was called for the sole purpose of determining whether to authorize the sale to them on the terms they had negotiated with the trustee in bankruptcy. Further, if they were not parties before, they surely became parties as a result of their purchasing the stock in accordance with the order.

Not all of the defendants were purchasers in the sense that they had new stock certificates issued to them as a result of the sale. So not all of them may be considered parties to the order of sale as a result of their status as purchasers. However, the effects of res judicata are not limited to the "parties" to a proceeding, but also extend to privies of the parties Montana, supra, at 440 U.S. 155, 99 S.Ct. 974. In this case, those defendants who were not actual purchasers under the bankruptcy sale either are privies of those who were, or they are not liable as a matter of substantive law.

Although the defendants deny it, plaintiffs allege that they acted together as members of an unincorporated association, H. E. Avent et al., and they conspired together, or aided and abetted one another, in acquiring the PFC stock through fraud and other wrongdoing.

But if the defendants really did the things alleged, if they really were privy to the alleged wrongdoing for purposes of substantive law, then surely they were also privy to the proceeding through which they were alleged to have accomplished their fraudulent aims.

The plaintiffs cannot claim that the defendants participated in a fraudulent purchase for purposes of holding them

liable, but not for purposes of the order entered as a result of the judicial proceedings through which the allegedly fraudulent purchase was carried out.

c. The Bankruptcy Court was the only court of competent jurisdiction to hear claims related to the sale of stock proposed by the trustee.

The order authorizing the sale was entered by the United States Bankruptcy Court for the Middle District of Louisiana. Under the Bankruptcy Amendments and Federal Judgeship Act of 1984, plenary jurisdiction over the bankruptcy proceeding, and over all matters connected with it, was actually vested in the United States District Court for the Middle District of Louisiana. 28 U.S.C. Sec. 1334. However, in accordance with 28 U.S.C. Sec. 157(a), responsibility for "core" and certain other proceedings was referred by the district court to the bankruptcy court by Rule 29.1 of the Local General Rules of the United States District Court for the Middle District of Louisiana. Orders authorizing the sale of property of the estate are considered "core" matters for purposes of this referral. 28 U.S.C. Sec. 157(b)(2)(M). Thus, the district court, acting through its referral of the matter to the Bankruptcy Court, was a court of competent jurisdiction for purposes of determining not only the adequacy and lawfulness of the terms of the sale, but also all other matters related to the bankruptcy proceeding. Further, no argument has ever been made that the Bankruptcy Court was without jurisdiction to render its order of February 13, 1985.

d. The same "claim" or "cause of action" pursued by the plaintiff in the bankruptcy action is being pursued by plaintiff herein.

This Court's opinion in Montana is especially helpful in determining whether the "same claim" is made in the case at bar

as was made in plaintiff's objection to the proposed sale of stock before the bankruptcy court. The Court, in Montana simply compared the relief sought by the United States in the later suit to the relief sought by the contractor in the first suit filed. After concluding that the relief sought in both suits was the same, the Court ruled that the "same claim" requirement of res judicata had been met. Montana at 440 U.S. 156-157; 99 S.Ct. 975.

Using this same method, this Court should affirm the decision of the Fifth Circuit. In the bankruptcy court, plaintiff objected to the trustee's application to sell the PFC stock. The objection urged that the stock should not be sold or that the sale should be made at a higher price. Thus, the questions of whether or not to sell and the appropriate price were both at issue.

In the case presently before the Court, the plaintiff has sought two forms of relief in the alternative. They are (1) that damages be paid for the difference between the sale price and the allegedly higher fair market value or (2) that the sale be rescinded, with damages to be paid to restore plaintiff to the position he would have held if he had never sold his stock. Either form of relief would nullify an essential element of the Bankruptcy Court's judgment. In order to grant any of the relief sought by the plaintiff, a court would necessarily disturb the bankruptcy court's finding of adequacy of the sale price or grant of authority to sell.

Plaintiff argues in brief that res judicata should not bar him from re-litigating the issues in this case because he did not have a fair opportunity to litigate them in the Bankruptcy Court. This argument is a "red herring."

Rule 6004 provides the procedural mechanism by which a trustee exercises substantive authority to sell property of the estate. That rule provides:

> (a) Notice of a proposed use, sale or lease of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c)(1), and (i) and, if applicable, in accordance with Sec. 363(b)(2) of the Code.
>
> (b) Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than five days before the date set for the proposed action or within the time fixed by the court. An objection to the proposed use, sale, or lease of property is governed by Rule 9014. (Emphasis added.)

Accordingly, an objection to a proposed sale is governed by Rule 9014. Hendrick filed an objection to the proposed sale exactly as is contemplated by Rule 6004. A review of Rule 9014 shows that:

> In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. ...unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7072. An entity that desires to perpetuate testi-

> mony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. (Emphasis added.)

The rules adopted in Rule 9014 allowed Hendrick to use every discovery device available to a party whose case is before a federal district court. And, lest there be any doubt that Rule 9014 contemplates an adversary proceeding of the type referred to in Rule 60(b), the advisory committee note to Rule 9014 provides that:

> Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter...
>
> ...When the rules of Part VII are applicable to a contested matter, reference in the Part VII rules to adversary proceedings is to be read as a reference to a contested matter...

Certainly, counsel for Hendrick and Starns were aware of these rules when the application for and objection to authority to sell Hendrick's stock were filed. This knowledge of the easy access to the procedural discovery devices available in bankruptcy is proven by the fact Starns and Hendrick both noticed and conducted many depositions in Hendrick's bankruptcy before and after the sale.

Considering the circumstances surrounding the application to sell the PFC stock, plaintiff's argument that he was, in effect, a "hapless victim" of a sale "railroaded" through by the trustee is indisputably false.

Further, because the trustee, and not some party opposed to the interests of the bankrupt estate, decided whether and when to bring the application before the court, only he could decide what issues would be litigated and when. If the trustee thought there was reason to investigate, it was his right and duty to do so and he could do it at his own pace.

2. FRCP 60(b) PROVIDES THE ONLY PROCEDURAL METHOD BY WHICH PLAINTIFF MAY PROPERLY ATTACK THE FINAL JUDGMENT OF THE BANKRUPTCY COURT.

Rule 60(b) authorizes a court to grant relief from a final judgment, order or proceeding upon a proper showing and just terms. The district court found that:

> Plaintiff could and should have attacked the final judgment of the bankruptcy court by way of a timely filed motion under Bankruptcy Rule 9024 or under Rule 60(b) in this Court. The issue confronting this Court is whether any other remedies are available to the plaintiff to challenge the validity of the final judgment of the bankruptcy court.

The district court relied heavily on Met-L-Wood Corp. v. Pipin, 861 F.2d 1012 (7th Cir. 1988). The court's reliance on Met-L-Wood is well placed. The facts, relationships of the parties and pragmatic rationale are virtually identical to those presently before the Court. The plaintiff in Met-L-Wood was the former debtor in the bankruptcy proceeding whose property was sold. In the bankruptcy proceeding, the judge ordered the sale of substantially all of Met-L-Wood's assets. Six months

after the sale, the case was converted from a Chapter 11 to a Chapter 7 bankruptcy and a trustee was appointed. The trustee, after investigating the judicial sale of assets filed suit against Pipin and others alleging fraud, collusion and RICO violations arising from the sale. About eighteen months after the sale was approved, the trustee filed a motion pursuant to FRCP 60(b)(3) seeking, among other things, to set aside the court's order authorizing the sale of assets because of the alleged fraud.

The court in Met-L-Wood dismissed the Rule 60(b)(3) motion on the grounds that it was not timely filed. A second judge dismissed the fraud suit on the basis of collateral estoppel, arising from the bankruptcy court order confirming the sale. Both decisions were affirmed on appeal.

The district court and the Fifth Circuit in this case properly found that in order to effectuate the public policy set forth in Met-L-Wood and Bankruptcy Rule 363(m) the final judgment rendered by the bankruptcy court should not be disturbed except for the substantive reasons enumerated in Rule 60(b) and then only if the proper procedures outlined in that rule had been followed.

a. Plaintiff did not seek relief pursuant to FRCP 60(b) in a proper and timely fashion.

Because defendant cannot address this issue more concisely or eloquently than the courts below have, their reasoning is adopted herein in lieu of repetitive argument.

3. PLAINTIFF IS NOT ENTITLED TO RELIEF PURSUANT TO RULE 60(a) BECAUSE SUCH RELIEF WOULD RESULT IN IMPERMISSIBLE SUBSTANTIVE CHANGES INCONSISTENT WITH THE BANKRUPTCY COURT'S INTENT.

The decisions cited by the Fifth Circuit in support of its denial of relief pursuant to FRCP 60(a) are in complete accord with holdings by other circuit courts. The general rule of the Fifth Circuit, as applied in this case is that any error that is not "of the sort that a clerk or amanuensis might commit, mechanical in nature" is beyond the scope of Rule 60(a). Warner v. City of Bay St. Louis, 526 F.2d. 1211, 1212 (5th Cir. 1976). The holding in Warner is consistent with the specific intent of the Rule which provides relief from "clerical mistakes in judgments."

Plaintiff believes he might get relief under the holdings of the Ninth or Tenth Circuits because those courts have chosen different words to express the rule. The Tenth Circuit, in Allied Materials Corp. v. Superior Products Co., 620 F.2d 224 (10th Cir. 1980), offers relief when the written words of a judgment do not match the judge's intent. A review of the facts and holding in Allied shows that the rule is just "a rose by another name." Clearly, the clerical error that resulted in the misplaced decimal in Allied would be cured within the rules enunciated by the Fifth Circuit in Warner. Further, in the instant case, there is no doubt that the rule expressed by the Tenth Circuit in Allied would not change the result here even if taken to its logical extreme.

Assuming for the sake of argument that Rule 60(a) empowers a court to amend the order of the Bankruptcy Court

to destroy its res judicata effect, it is clear that the rule authorizes such only if it is in accord with the intent of the judge rendering the order. That the amendment requested by plaintiff would not accord with Judge Steen's intent, but would frustrate and deny that intent is clear from the transcript of the hearing, the pleadings which precipitated the hearing and subsequent comments by Judge Steen.

A review of the relevant facts reveals that the judge and the trustee's counsel appreciated the finality of the court's ruling. After some discussion with counsel for the trustee, at the hearing on the trustee's application to sell, the bankruptcy court expressed its concerns that a sale of the stock pursuant to the court's order waived whatever claims the trustee might have with respect to the sale. As reported in the transcript, the court commented:

> Do you think that the retention of I assume its securities rights that you would have for any damages which you may have suffered under securities laws I assume on account of the Avent suit. Do you think that you retained those rights notwithstanding your having suspicions prior to the sale? What I am saying, if you do have suspicions prior to selling, you go ahead and sell anyway.
>
> Do you think you retained any of your rights? (Emphasis added.) Transcript, Ex. 6, p. 5.

Trustee's counsel admitted that he was uncertain whether his reservation of rights was effective. His uncertainty is revealed by his comments reported in the transcript:

> ...The trustee believes that under the circumstances $150,000 now is a lot better than reserving, is a lot better than $250,000 down the road after litigation. Now, that is not to say that litigation won't ensue. And, what I understand the court's question is, have I attempted to waive those rights by knowingly entering into the agreement.
>
> I think that I have the duty to mitigate my damages. And, this is certainly within the scope that I contend for the estate mitigating its damages that it may have by at least agreeing to what it can get. (Emphasis added.) Transcript, Ex. 6, p. 9.

Throughout the course of the hearing the court made no comment which would in any way act as a reservation of rights nor does the court make any comment which would imply that the court believed that any rights were properly reserved. After having heard the evidence and arguments of counsel, the court said:

> ...And I would hope that the Trustee would bring an action if he finds that there is a right on behalf of the estate to recovery of some sums if it's less than its proportionate share. (Emphasis added.) Transcript, Ex. 6, p. 43.

At the outset, it should be noted that to order an investigation into possible fraudulent conduct is not inconsistent with the notion of a final judgment subject to direct attack for reasons set forth in FRCP 60(b).

The court's comments indicate the interest which any bankruptcy judge has that the trustee should pursue rights to recover money on behalf of the debtor's bankrupt estate. However, the comments of the court also indicate that the judge has uncertainty that a claim of any sort would continue to exist after a sale pursuant to his order. Further, the court instructs the trustee to bring an action "if he finds there is a right" on behalf of the estate. This is an indication that the court wished for the trustee to examine not only the facts surrounding the sale but also the legal issues which might dictate a result in any anticipated litigation. There is a huge gap between the court's comment that the trustee should bring an action "if he finds there is right" and a statement by the court that any such right is reserved to the trustee. Lest there be any doubt regarding the court's intent that his order would be final, one need look no further than the four corners of the order prepared by the trustee's counsel and signed by the judge. The order proclaims that the trustee is authorized to sell the stock "free and clear of all liens, claims and encumbrances". Noticeably absent from the order is any indication that the court has reserved to the plaintiff any right whatsoever.

Reference to the judge's explanation of his intent regarding the order can be found in the transcript of the bankruptcy court's hearing of April 9, 1986. In that transcript, the court explains that:

> The trustee at the time, if I remember correctly, needed cash to pay any number of things. And the trustee recommended that the offer be accepted.
>
> The offer seemed unusual to say the least because it just was not in my prior experience that some

> offerer appears out of nowhere and offers a good price for a company and then goes through a cursory examination of the company. So I remember directing the trustee, I remember authorizing the sale but in authorizing the sale I told the trustee that the offer appeared odd. And that also before the sale was consummated that the trustee ought to examine the circumstances of the offer to satisfy himself that it was a bona fide offer, and that the transaction was an arms-type in length third-party type of transaction and that it was not some interested party or some insider involved in a surreptitious offer. [Emphasis added.] Transcript of Hearing on Application of Trustee to Continue Employment of Special Counsel, April 9, 1986, Ex. 11, p. 33.

In the comments quoted above, the judge makes it abundantly clear that he expected and instructed the trustee to make his investigation of the sale before the sale was consummated. This explanation by the court is totally at odds with any intent of the court as "divined" by the plaintiff in this proceeding.

G. CONCLUSION

Because the Fifth Circuit's opinion falls squarely within every applicable mandate of this Court and because the circuit courts which have addressed these issues are in total accord, there is no need for further review of this case. It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AND DEBORAH
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WILLIAM E. STEFFES
UNITED STATES BANKRUPTCY COURT

MIDDLE DISTRICT OF LOUISIANA

IN RE:	) CASE NO.
	) 83-00787
RODNEY D. HENDRICK	)
	) A REORGANIZATION
DEBTOR	) CASE
	)
	) (Filed Feb 13, 1985)
	)

ORDER

THIS MATTER came up for hearing on Application by Donald F. Starns, Trustee, seeking authority to sell stock free and clear of all liens, claims, and encumbrances, including co-owner's rights, and to dismiss litigation.

CONSIDERING the Application, the record of this case, the evidence presented, the stipulation of counsel for Judith Polk Hendrick, good grounds appearing therefore, for reasons orally assigned;

IT IS HEREBY ORDERED that Donald P. Starns, Trustee, is hereby authorized to sell all of the estate's shares of stock in PFC, Inc., said sale to be free and clear of all liens, claims, and encumbrances, including any and all alleged co-owner's rights or right of first refusal of Judith Polk Hendrick.

IT IS FURTHER ORDERED that Donald P. Starns, Trustee, is hereby authorized to execute any and all documents

in conjunction with the sale, to endorse and deliver the stock, to dismiss the cross-complaint referenced in the Application, and do any and all other matters in order to effectuate its intents and purposes of this Order.

ORDER ENTERED at Baton Rouge, Louisiana this 13th day of February, 1985.

ORDER SIGNED at Baton Rouge, Louisiana this 13th day of February, 1985.

/s/_____
UNITED STATES BANKRUPTCY JUDGE

AGREED:

/s/ David S. Rubin
David S. Rubin
Attorney for Donald P. Starns, Trustee

/s/ Samuel L. Abide
Samuel L. Abide
Attorney for Judith Polk Hendrick

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	83-CP-16-570
Francis A. Collins, Plaintiff, vs. PFC, Inc., James A. Fink, Jr. Herbert L. Polk and Rodney Hendricks, Defendants.	O R D E R

In this action the plaintiff, the holder of thirty (30) shares of common stock of PFC, Inc., has sued the defendants for his alleged damages arising out of what he contends was the wrongful issue by the defendant PFC, Inc. to the defendants Fink, Polk, and Hendricks of 3000 shares of common stock of PFC, Inc. on June 12, 1981. According to the Complaint, as a result of the aforesaid stock issue the outstanding stock of the corporation was increased from 100 shares to 3100 shares and the plaintiff's percentage ownership of the outstanding stock decreased from 30% to less than 1%. It is the plaintiff's position that this stock issue violated his preemptive rights under Section 33-11-210 of the South Carolina Code of Laws (1976). It is the plaintiff's further contention that the acts of the defendants in issuing the said stock constituted fraud and deceit and conversion. The defendants in their Answer have denied wrongfully damaging the plaintiff, contending instead that the plaintiff was afforded but waived his preemptive rights, and

that the plaintiff was fully informed of his rights to participate in the additional stock issue but chose not to exercise such rights.

On November 22, 1983 this Court heard motions made by the plaintiff, with the purpose of the motions being to preserve the financial and capital status of the corporation pending the outcome of this litigation and to give to the plaintiff under the supervision of the court his statutory rights to inspect the books and records of the defendant PFC, Inc. Messrs. John Jay James, II and Albert L. James, Jr. appeared on behalf of the plaintiff and Messrs. John C. Lindsay and Henry A. Hammer appeared on behalf of the defendants. At the hearing the court had before it the Complaint and the Notice of the Motions and heard oral arguments of counsel for the parties.

Based upon the arguments of counsel the writer hereof is of the opinion that the following measures should be granted.

(1) The defendant PFC, Inc. shall not pay directly or indirectly any attorney's fees or other litigation related expenses of the defendants Fink, Polk and Hendricks without the prior approval of a court of competent jurisdiction as provided by Section 33-13-180 (e) of the South Carolina Code of Laws (1976).

(2) The defendant PFC, Inc. is herewith authorized to pay to Messrs. Lindsay and Hammer the sum of Three Thousand Dollars ($3000.00) as part payment on account of a retainer fee chargeable to the corporation to be approved by the court.

(3) The plaintiff, his attorneys, accountants and other agents shall be allowed on a monthly basis to inspect on the business premises of PFC, Inc. in Hartsville, South Carolina,

all of the books and financial records of the defendant PFC, Inc., pendente lite. This inspection shall take place on the third Saturday of each month beginning on December 17, 1983. The defendant PFC, Inc. shall make available to the plaintiff and his agents the defendant Fink and the company's accountant to assist in the said inspection. This Court hereby retains jurisdiction over the matters set forth in this paragraph (3) and should any of the parties hereto determine that the arrangement herein provided is unworkable or unsatisfactory, such party may move before this Court for an order modifying the arrangement so provided herein.

(4) The plaintiff's attorneys Messrs. John Jay James, II, Albert L. James, Jr., Edward E. Saleeby, and James M. Saleeby shall have the right to go onto the business premises of the defendant PFC, Inc. on a weekly basis, pendente lite, for the purpose of inspecting the premises.

(5) The defendant PFC, Inc. shall not issue any additional stock, pendente lite.

(6) The defendants Fink and Polk shall not transfer any of their stock interest of PFC, Inc., pendente lite. The defendant Hendricks shall not transfer any of his stock interest of PFC, Inc. except such interest as may be required to be transferred by him to the defendant Polk or to the defendant Hendricks' present wife, the daughter of the defendant Polk, pursuant to a decree of a Louisiana family court or a property settlement agreement between the defendant Hendricks and his wife.

(7) The defendant PFC, Inc. shall not pay any dividends or make any loans to the defendants Fink, Polk and Hendricks or to members of their immediate families without prior Court approval, pendente lite.

(8) The defendant PFC, Inc. shall not sell its assets other than in the ordinary course of business without obtaining prior court approval, pendente lite.

(9) The defendant PFC, Inc. shall not be dissolved without prior court approval, pendente lite.

(10) The defendant PFC, Inc. shall not merge with any other corporation without obtaining prior court approval, pendente lite.

(11) The defendants Polk and Hendricks and members of their immediate families shall not receive any salary, bonus, director's fees or other compensation payments from the defendant PFC, Inc. in excess of compensation paid for the fiscal year ending February 28, 1983 without obtaining prior court approval, pendente lite.

(12) Pendente lite, the defendant Fink shall be entitled to receive a weekly salary from the defendant PFC, Inc. in the amount of $550.00. In addition the defendant Fink shall be entitled to receive an annual bonus in an amount equal to 3% of the gross profits of the defendant PFC, Inc. In addition to the said bonus an amount equal to 3% of gross profits shall be put into an interest bearing escrow account, which will be held by the corporation. Upon the resolution of this lawsuit a court of competent jurisdiction shall determine whether or not the defendant Fink is entitled to receive as a bonus the additional 3% of gross profits held in the aforesaid escrow account. If it is determined that the defendant Fink is so entitled he shall be paid the sums in such escrow accounts including all interest paid and/or accrued. For purposes of this paragraph (12) gross profits means the net income of the defendant PFC, Inc. before payment of federal and state income taxes. Members of the

defendant Fink's immediate family shall not receive any salary, bonus, director's fees, or other compensation payments from the defendant PFC, Inc. in excess of compensation paid for the fiscal year ending February 28, 1983.

AND IT IS SO ORDERED.

/s/ _____
John H. Waller, Jr.
Presiding Judge of the Fourth
Judicial Circuit

/s/ _____
December 8, 1983.

UNITED STATES BANKRUPTCY COURT

MIDDLE DISTRICT OF LOUISIANA

IN RE:	§ CASE NO. 83-00787
	§
RODNEY D. HENDRICK	§
	§
DEBTOR	§ A REORGANIZATION
	§ CASE

APPLICATION BY TRUSTEE TO SELL STOCK FREE AND CLEAR OF ALL LIENS, CLAIMS, AND ENCUMBRANCES, INCLUDING CO-OWNER'S RIGHTS, AND TO DISMISS LITIGATION

The application of Donald P. Starns, Trustee of the Debtor ("Trustee"), through undersigned counsel, respectfully represents as follows:

1.

This case was filed on November 21, 1983. On January 31, 1984, the Trustee was appointed by this Court.

2.

The Debtor is the owner (apparently in community with his former wife, Judith Polk Hendrick) of ten percent (10%) of the stock of PFC, Inc., a boat manufacturing company located in Hartsville, South Carolina.

3.

At the time of the filing of the Debtor's petition, he was a party to that certain action pending in the Court of Common

Pleas for the County of Darlington, South Carolina, entitled "Francis A. Collins Vs. PFC, Inc., James A. Fink, Jr., Herbert L. Polk, and Rodney D. Hendrick" (hereinafter referred to as the "Action"). The plaintiff in the Action, Francis A. Collins ("Collins"), alleges that the defendants, including the Debtor, conspired and/or otherwise acted in violation of the securities laws of the State of South Carolina and/or the United States. Collins alleges damages in excess of $4,000,000.00. The substance of Collins' allegations are set forth in his complaint, a copy of which is attached hereto as Exhibit A. Trial of the Action was set for early 1985.

5.

The Trustee was named a defendant in the Action, and has been required to employ counsel in South Carolina in order to protect the interests of the estate and its creditors. The substance of the defenses raised by the Trustee are set forth in his Answer and Answer to Amended Complaint and Cross-Complaint, copies of both of which are attached hereto as Exhibits B and C.

6.

The Trustee believes that the defenses raised by him and the cross-complaint filed by him are substantial and meritorious. However, Collins' allegations are serious and an adverse judgment would severely impact and impede the reorganization capability of the Debtor.

7.

The Trustee has received an offer to purchase the estate's interest in shares of stock in PFC, Inc. (hereinafter the "stock"). PFC, Inc. ("PFC") is the company which Collins alleges issued additional stock to his detriment. The offer to purchase provides in general as follows:

(a) Controlling interest in PFC, Inc. will be purchased in an allegedly non-collusive arm's length transaction by Henry Avant, et al (the "Buyers").

(b) The estate will receive a cash payment of One Hundred Fifty Thousand and No/100 ($150,000.00) Dollars from the Buyers for the stock.

(c) Defendant H. L. Polk has already, upon information and belief, received a cash payment of approximately Eight Hundred Fifty Thousand and No/100 ($850,000.00) Dollars from the Buyers.

(d) The estate will sell its ten percent (10%) ownership interest in PFC, Inc. (330 shares) to the Buyers.

(e) Defendant H. L. Polk has already, upon information and belief, transferred his ownership interest in PFC, Inc. to the Buyers.

(f) Collins, upon information and belief, has already received a cash payment of approximately Eight Hundred Fifty Thousand and No/100 ($850,000.00) Dollars from the Buyers, and has transferred all of his ownership interest in PFC, Inc. to the Buyers.

(g) The Trustee and the estate will not release Defendant H. L. Polk, Defendant PFC, Inc., Defendant Al Fink, or Debbie Fink, from any claims concerning PFC, Inc. or any matters arising out of or in connection with the matters alleged by Collins. The Trustee has agreed simply to permit the principal Action by Collins to be dismissed without the Trustee's consent, as nonsuit without prejudice. However, the cross-complaint by

the Trustee against all the other co-defendants has not been dismissed. The Trustee proposes to dismiss the cross-complaint by way of non-suit without prejudice.

8.

The benefits to the estate and its creditors from the proposed sale are numerous, and include the following:

(a) Receipt by the estate of One Hundred Fifty Thousand and No/100 ($150,000.00) Dollars cash. The Trustee's certified public accountant has investigated to some extent the value of PFC, Inc., and has concluded that the offer being made to the estate and the Trustee equals or exceeds the book value of PFC, Inc.

(b) The Debtor and the estate will be released from contingent liability as an endorser and/or guarantor in the indebtedness of PFC, Inc. to Louisiana National Bank of Baton Rouge ("LNB"), approximating Three Hundred Thousand and No/100 ($300,000.00) Dollars. In fact, upon information and belief, the Buyers paid this debt to LNB in full on December 21, 1984.

(c) The Debtor and the estate will have no further exposure on Collins' Four Million and No/100 ($4,000,000.00) Dollars claim.

(d) The reorganization chances for Debtor will be significantly enhanced.

9.

Judith Polk Hendrick ("Polk") alleges an interest pursuant to the community property laws of the State of Louisiana in one-half of the Stock. Further, she has previously alleged a

"right of first refusal" under 11 U.S.C. 363(h) to purchase property from the estate. As evidenced by the consent of her attorney to this application, Polk waives the filing of an adversary proceeding herein, waives her "right of first refusal to purchase the PFC stock," and consents to the Sale of the stock.

10.

Upon information and belief, Collins and Polk have already transferred their shares of stock in PFC and received the payments due them, or at least a portion thereof.

11.

The Trustee has significant concern for the manner in which the offer was made and structured. The Trustee believes he may be entitled to a higher price than is actually being offered. Nevertheless, the Trustee believes that the offer is fair and equitable under the circumstances and is in the best interest of the creditors of the estate.

WHEREFORE, DONALD P. STARNS, TRUSTEE, prays that:

I. The sale of the stock be approved;

II. The Trustee be authorized to execute any and all documents necessary to complete the sale and effectuate its intents and purposes; and

III. The Trustee be authorized to dismiss the cross-complaint; and

IV. For such other and further relief as is just and equitable.

Dated: February _____, 1985

By Attorneys,

KANTROW, SPAHT, WEAVER & BLITZER
P. O. Box 2997
Baton Rouge, LA 70821-2997
Telephone (504) 383-4703

By: /s/_____
David S. Rubin
Bob D. Tucker
Attorneys for Donald P. Starns, Trustee

CONSENT

The undersigned counsel for Judith Polk Hendrick ("Polk") has read the foregoing Application, and on behalf of Polk consents to the filing of said Application instead of an adversary proceeding. Further on behalf of Polk, Polk waives her right to service of summons, and/or citation, her "right of first refusal" under 11 U.S.C. §363(h), and consents and joins in the foregoing Application, having no opposition thereto.

ANDERSON,McNULTY,
O'CONNOR & STAKELUM

BY: /s/_____
Attorneys for Judith
Polk Hendrick

Date: February 6, 1985

UNITED STATES BANKRUPTCY COURT

MIDDLE DISTRICT OF LOUISIANA

IN RE:

RODNEY D. HENDRICK, CASE No. 83-00787

DEBTOR

OBJECTION TO PROPOSED PRIVATE SALE OF STOCK

Now into Court, through undersigned counsel, comes Rodney D. Hendrick, debtor herein, who respectfully avers:

1.

Donald P. Starns, Chapter 11 Trustee, has filed an application seeking authority for approval to sign all of the debtor's common stock in PFC, Inc. for the price of $150,000.00 cash to be paid at the act of sale; a hearing on said application is scheduled for February 13, 1985 at 4:15 p.m.

2.

The debtor objects to the proposed private sale since the price being offered is less than two-thirds than the fair market value of the stock and since the price being paid for the estate's interest in PFC, Inc., on a per share basis, it is far less than that paid for the ownership interest in PFC, Inc. owned by Al Collins and Herbert L. Polk.

3.

On information and belief, the debtor alleges that the ownership interest of Herbert L. Polk was 30 per cent and that he was paid the sum of $800,000.00 by the same purchasers for

that 30 per cent interest; likewise, adjusting for the alleged watered stock, Mr. Al Collins was also paid $800,000.00 for his 30 per cent ownership interest.

4.

Accordingly, based upon the price paid to Herbert L. Polk and Al Collins, the estate should have received $266,667.00 for its 10 per cent ownership interest in PFC, Inc.

5.

Alternatively, if we presume that the purchasers were willing to pay $1,750,000.00 for the 70 per cent ownership interest in PFC, Inc. held by Mr. Collins, Mr. Polk and the debtor's estate, then the debtor's estate should have received the sum of $250,000.00.

WHEREFORE, the debtor prays that the Trustee's application for authority to sell the estate's ownership interest in PFC, Inc. for the sum of $150,000.00 be denied; and, for any and all other further relief to which the debtor may be entitled.

By Attorneys,
STEFFES & MACMURDO
8966 Interline Avenue, Suite D
Baton Rouge, Louisiana 70809
Telephone: (504) 923-0251

BY: /s/_____
WILLIAM E. STEFFES

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has this day been served upon the Chapter 11 Trustee, through his counsel of record, by personally handing him a copy of same at Baton Rouge, Louisiana, on this 13th day of February, 1985.

/s/_____